



---

Volume 38 | Issue 3

Article 8

---

April 1932

## Contempt of Court--Falsification of Evidence

August W. Petroplus

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Criminal Law Commons](#), and the [Evidence Commons](#)

---

### Recommended Citation

August W. Petroplus, *Contempt of Court--Falsification of Evidence*, 38 W. Va. L. Rev. (1932).

Available at: <https://researchrepository.wvu.edu/wvlr/vol38/iss3/8>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

separate income tax return covering one-half the community income. With one possible exception the Federal government has a uniform policy now in both community property and other states. Up to June 26, 1922, the Treasury Department permitted a husband and wife, who had originally elected to file a joint return, to file amended separate returns, but on that date a contrary ruling was made, so that now they may have to pay a higher tax based on their aggregate income.<sup>16</sup>

If it be said that the Hoeper case, in which Mr. Justice Roberts also wrote the majority opinion, stands for uniformity in state and federal income tax administration, the answer is simply that the only desirable uniformity is as to the federal law. The state of Wisconsin has said expressly that the husband shall be so taxed and has applied this law for over twenty years. It would seem that the "benign" attitude evinced so recently toward other legislation might have permitted Wisconsin to continue to tax incomes in this manner.<sup>17</sup>

—BERNARD SCLOVE.

---

CONTEMPT OF COURT — FALSIFICATION OF EVIDENCE. — A federal judge sitting in New York deplores the loose ideas of testifying now current in our courts and the numerous perjuries on the witness stand that escape notice.<sup>1</sup> Rather than stop short with deprecatory remarks regarding this evil, as other juristic commentators are prone to do, he proceeded to sentence a witness who had perjured himself for contempt of court. The witness, J. D., had testified that he was on board a certain scow at the time of its sinking and that he had seen the accident. Two other witnesses testified that they had met J. D. when he arrived on the scene of the disaster, and at that time he was first informed of the sinking of the scow. J. D. thereupon confessed that he had lied, and the judge held him in contempt of court for having wilfully testified falsely. *The Dunnigan Sisters*.<sup>2</sup>

Whether perjury can be summarily punished as contempt of court is a question which often arises. The cases seem to agree

---

<sup>16</sup> The Revenue Act of 1928, § 51 (b) (1) and (2). See also Sol. Op. 90, Treasury Dept. Cumulative Bull. No. 4, p. 236 (June 1921).

<sup>17</sup> *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U. S. 251, 51 S. Ct. 130 (1931); (1932) 32 Col. L. Rev. 374.

<sup>1</sup> *The Dunnigan Sisters*, 53 F. (2d) 502 (D. C., S. D. N. Y., 1931).

<sup>2</sup> *Ibid.*

that perjury may constitute contempt of court if it is obstructive of the due administration of justice, but there is a variance regarding the manner in which the falsehood must appear and the essential elements of the offense. Occasionally the constitutional questions of double jeopardy and right to trial by jury arise and must be disposed of.

The power to punish for contempt has long been recognized as inherent in all courts of record. The power is essential to the very existence of the court and its protection, for, without it, all other powers conferred upon the court could not be effectively exercised and the orderly administration of justice would be an impossibility.<sup>3</sup> Without this power, the machinery for enforcing obedience to judgments, orders, and judicial writs could not possibly function.<sup>4</sup> As to what constitutes contempt, we have the definition of the West Virginia Court, which is typical of many others; "Contempt is defined as an act in disrespect of the court or its processes, or which obstructs the administration of justice, or tends to bring the court into disrepute."<sup>5</sup> Obviously, almost any act of embarrassment to the court might be brought under the generality of its terms. However, the acts punishable as contempts have been, more or less, pigeon-holed, and there seems to be no disposition on the part of the courts to make an arbitrary extension of their power. One well defined class of contempts is that of the witness who deliberately gives false evidence in court. The trend of modern decisions is to punish perjuring witnesses more freely for contempt, and thus by the exercise of a recognized judicial process the courts are bringing about an important judicial reform without outside aid.

A refusal to answer questions, either before a grand or petit jury, has been held a contempt,<sup>6</sup> because it obstructs the administration of justice, and it has been said that prevarication by a witness has the same effect upon the administration of justice as a refusal to answer, and, therefore, it is a direct contempt of the

<sup>3</sup> *State v. Frew*, 24 W. Va. 416 (1884); *Bessette v. Conkey Co.*, 194 U. S. 324, 24 S. Ct. 665 (1904).

<sup>4</sup> *Ex parte Robinson*, 19 Wall. 505 (1873); *Joyce v. Everson*, 161 Ind. 440, 443, 69 N. E. 135 (1903).

<sup>5</sup> *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791 (1897).

<sup>6</sup> *Kendrick v. Commonwealth*, 78 Va. 490 (1884) refusing to testify before a grand jury; *Berkson v. People*, 154 Ill. 81, 39 N. E. 1079 (1894) refusal of a judgment debtor to testify concerning the disposition of his property; *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 675 (1895) refusal to give evidence before a notary.

authority of the court.<sup>7</sup> The requisites of the offense are three: 1. The court must have judicial knowledge of the falsity of the testimony. 2. The act must have an obstructive effect. 3. The question asked the witness must be pertinent to the issue. False testimony given in bankruptcy cases has been held punishable as contempt under § 41 of the Bankruptcy Act of 1898: "A person shall not in proceedings before a referee . . . after having taken the oath, refuse to be examined according to law."<sup>8</sup> A refusal to be examined according to law consists of a refusal to answer a question, a deliberate falsehood, or an evasive answer.<sup>9</sup> Mere perjury, though, is not punishable as a contempt. The federal cases follow a test stated in the case of *United States v. Appel*:<sup>10</sup> Does the testimony on its mere face, *without collateral inquiry*, appear to be a *bona fide* effort to answer the question at all? If the witness should pretend to be ignorant of facts which obviously would be known to anyone who has sufficient intellect to perform the most ordinary duties of life, his testimony would be palpably false and he should be punished for contempt. An example is a statement that the witness did not remember where he slept the night before. Sham or evasive answers of "I don't know", or "I don't remember", come within the scope of the test. The federal test, though, is supposed to preclude the judge from weighing the plausibility of the evidence before him by a consideration of extraneous evidence. Notwithstanding the supposed limits established by this test, the case of *Ex parte Hudgings*<sup>11</sup> goes further than the ordinary run of cases. A witness was punished for false swearing although there was nothing in his testimony to show plainly that it was false. The court merely formed that opinion from a consideration of all the evidence. The case illustrates the

<sup>7</sup> *In re Gitkin*, 164 Fed. 71 (D. C., E. D. Pa., 1908); *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299 (1895); *Riley v. Wallace*, 188 Ky. 471, 222 S. W. 1085, (1920).

<sup>8</sup> *In re Gitkin*, *supra* n. 7; *In re Fellerman*, 149 Fed. 244 (D. C., S. D. N. Y., 1906); *In re Singer*, 174 Fed. 208 (D. C., E. D. Pa., 1909); *In re Shear*, 188 Fed. 677 (D. C., W. D. N. Y., 1911); *U. S. v. Appel*, 221 Fed. 495 (D. C., S. D. N. Y., 1913).

<sup>9</sup> *In re Gitkin*, *supra* n. 7; *In re Rosenberg*, *supra* n. 7.

<sup>10</sup> 211 Fed. 495, (D. C., S. D. N. Y., 1913).

<sup>11</sup> 249 U. S. 378, 39 S. Ct. 337, 11 A. L. R. 333 (1919). The falseness of statements under oath is in most cases either admitted or so clearly shown by the witness's own statements, as to be apparently beyond question. But in this case, there was nothing in the testimony itself to show it was false, and the witness denied the falsity of his statements. The Court said: "A district court has power to adjudge a witness guilty of contempt solely because in the court's opinion he is wilfully refusing to testify truthfully, and to confine him until he shall purge himself by giving testimony which the court deems truthful."

wide discretion the judge has in weighing the plausibility of the evidence offered. The danger in this extreme is apparent. A court might arrogate to itself a power to confine a witness until he shall purge himself by giving testimony which the court deems truthful.<sup>12</sup> The witness in that case said: "I do not remember of ever having seen him write." The court said that the answer on its face did not appear to a *bona fide* attempt to answer the question.

How must the falsehood manifest itself before the court may punish for contempt? A witness may admit the falsity of his evidence as was done in *People v. Freeman*.<sup>13</sup> When the witness admitted on cross-examination that the evidence he gave on the direct examination was false, the court summarily imposed a punishment without going into any extraneous evidence to prove the falsity of the statement. The falsehood may be obvious by reason of unquestioned or incontrovertible evidence, in which case the court would be shirking a clear duty if it failed to punish perjury as contempt.<sup>14</sup> But the courts should not punish where the facts are in dispute, not because of lack of power, but because a sound public policy requires that offenders should be left to the criminal law.<sup>15</sup> The courts should not weigh conflicting evidence in contempt proceedings of this nature, but should leave the alleged contemnors to be punished criminally. In *People v. Stone*<sup>16</sup> it is said that the court must judicially know the evidence is false before punishing the witness for contempt. In defining what is meant by judicial knowledge it is said that this knowledge may come either from the admissions of the witness or from incontrovertible evidence, and the court should not act merely upon belief or conclusions drawn from the evidence. The case is out of line with federal cases, where the courts have gone a long way in contempt proceedings in weighing conflicting evidence.

It is generally conceded that mere perjury should not be punished as contempt unless it has the further element of obstructing justice.<sup>17</sup> Whether an act is an obstruction of the administration of justice depends, of course, on the peculiar facts of the case. In *State v. Meese*,<sup>18</sup> two days were consumed in demonstrat-

---

<sup>12</sup> *State v. Meese*, 200 Wis. 460, 229 N. W. 31 (1930).

<sup>13</sup> 256 Ill. App. 233 (1930).

<sup>14</sup> *Edwards v. Edwards*, 87 N. J. Eq. 546, 100 Atl. 608 (1917).

<sup>15</sup> *Edwards v. Edwards*, *supra* n. 14.

<sup>16</sup> 181 Ill. App. 475 (1913).

<sup>17</sup> *Supra* n. 12, and n. 11.

<sup>18</sup> *Supra* n. 12.

ing the falsity of the witness's statement. It was held that an act is not obstructive to justice on the mere ground that the time of the court is consumed in demonstrating its falsity. The reasoning of the case is not quite convincing, and would appear to be irreconcilable with decisions holding dilatory acts to be contempts because they delay the administration of justice.

An Illinois case<sup>19</sup> states a rigid doctrine. The court must have personal knowledge of the false evidence, or else it must appear false from the witness's own admissions, and from no other source whatsoever; it must appear to the court beyond a reasonable doubt that the evidence is false, that the witness knows it is false, and that he makes the statements with a wilful and malevolent intention of assailing the dignity of the court and interfering with its procedure; the court cannot reach its conclusions from the testimony of other witnesses. The decision practically vitiates the power of the court to punish a perjuring witness for contempt. On the other hand, a witness was punished by a contempt proceeding for giving false evidence which did not constitute perjury, namely, that his wife was not in the city, although it did not appear that the false evidence concerned a material fact in the case.<sup>20</sup> It was declared that the words might not be perjury, yet, if untrue, they may constitute contempt of court. The cases illustrate two widely divergent views of the problem under discussion. The weight of authority, however, is to the effect that perjury does not constitute contempt of court where it is committed in answer to a question which is not a material issue in the case.<sup>21</sup>

The objection has often been raised that perjury should not be punished as contempt because it is already punishable as a crime and the witness is twice subjected to punishment for the same offense.<sup>22</sup> Furthermore he is deprived of his constitutional right to trial by jury. Only in two jurisdictions, Louisiana<sup>23</sup> and Pennsylvania,<sup>24</sup> have these objections been held tenable. The great weight of authority is to the effect that perjury, although it may also be punished as a crime, may be a contempt. The one act con-

<sup>19</sup> *People v. Hille*, 192 Ill. App. 137 (1915).

<sup>20</sup> *Young v. State*, 198 Ind. 629, 154 N. E. 478 (1920).

<sup>21</sup> *Heglow v. State*, 24 Ohio App. 103, 155 N. E. 620 (1927; *In re Hudgings*, *supra* n. 11).

<sup>22</sup> *Gibson v. Hutchinson*, 148 Ia. 139, 126 N. W. 790 (1910).

<sup>23</sup> *State v. Lazarus*, 37 La. Ann. 314 (1885). The Court says: "A court has no power to punish a witness who swears falsely for contempt, as perjury is a substantive offense, and one so charged has a right to trial by jury."

<sup>24</sup> *In re Lerch's Contested Election*, 21 Pa. Dist. 1113 (1912).

stitutes two offenses, one against the state, the other against the court. A favored example is that an assault committed in court may be both a contempt and a crime.<sup>25</sup> The court is not executing the criminal law when it punishes false swearing.<sup>26</sup> It is vindicating and protecting itself against the obstructive act, and because perjury is a crime is no reason why it may not also afford a basis for punishment as a contempt.<sup>27</sup> Authority so to punish for contempt is inherent in all courts, whether with or without jurisdiction in criminal cases.<sup>28</sup>

Similarly the contention that a contemnor is entitled to a trial by jury is not well-founded. The West Virginia case, *State v. Bittner*,<sup>29</sup> holds that in a proceeding for contempt of court for disobedience to its lawful order or decree there is no constitutional right to trial by jury involved. It may be tried by the court summarily. The West Virginia Constitution guarantees a jury trial for all crimes and misdemeanors; a contempt of court is neither a crime nor a misdemeanor, and is not controlled by the limitations of the Constitution.

The cases do not purport to hold judicial authority is exempt from the constitutional limitations. The purpose in contempt proceedings is to secure judicial authority from obstruction in order that the preservation and enforcement of the Constitution can be secured.<sup>30</sup> The trial without jury in such cases has also been held not to violate the due process clause of the Constitution of the United States.<sup>31</sup> The case of *In re Debs*<sup>32</sup> convincingly disposed of the objection by showing that the power of a court to make an order carries with it an equal power to punish for disobedience of that order, and the question of inquiring into the disobedience has been a special function of the court from time immemorial. Without the power to compel obedience, a court can no more exist than without a judge.<sup>33</sup>

<sup>25</sup> *Edwards v. Edwards*, *supra* n. 14.

<sup>26</sup> *People v. Tool*, 35 Colo. 225, 86 Pac. 224, 229, 231; *State v. Roby*, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 6 R. C. L. 530, § 43.

<sup>27</sup> *In re Steiner*, 195 Fed. 299 (D. C., S. D. N. Y., 1912); *In re Hudgings*, *supra* n. 11; *Gibson v. Hutchinson*, *supra* n. 22.

<sup>28</sup> *In re Fellerman*, *supra* n. 8; *Gibson v. Hutchinson*, *supra* n. 22.

<sup>29</sup> *State v. Fredlock*, 52 W. Va. 232, 243, 43 S. E. 153 (1902); *State v. Bittner*, 102 W. Va. 677, 136 S. E. 202 (1926); *In re Shear*, *supra* n. 8.

<sup>30</sup> *Supra* n. 29.

<sup>31</sup> *Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 38 S. Ct. 560 (1918); *Marshall v. Gordon*, 243 U. S. 521, 37 S. Ct. 448 (1917).

<sup>32</sup> *Ellenbecker v. Plymouth Co.*, 134 U. S. 31, 10 S. Ct. 424 (1890).

<sup>33</sup> 158 U. S. 564, 15 S. Ct. 900 (1895); *Storey v. People*, 79 Ill. 45, 52 (1875); *Hunter v. U. S.*, 48 App. (D. C.) 19,25, (1918).

<sup>34</sup> *In re Debs*, *supra* n. 33.

Thus runs the language of the cases. Although contempt is said to be an offense against the court and not against the state, the argument would seem to be rather thin, as the court is not a sovereign apart from the state, of which it is an agency, and although the explanation why the case is not one for jury trial is really historical, the result is none the less desirable.

If false testimony on the stand is contempt, *a fortiori* the introducing of false written evidence constitutes contempt. A false lease,<sup>35</sup> false photographs,<sup>36</sup> and forged entries in the family Bible<sup>37</sup> have been punished as contempts. The acts of bribing a witness,<sup>38</sup> inducing one to swear falsely,<sup>39</sup> or procuring the absence of a witness<sup>40</sup> have been held contempts. Courts have punished persons who filed false affidavits,<sup>41</sup> and the filing of contradictory affidavits affords a basis for punishment for contempt.<sup>42</sup>

It is apparent from these cases that the courts possess a formidable power in the proceeding of contempt of court, a power which if properly exercised can be a salutary influence in the administration of justice. It may be a consciousness of their own strength that has led some courts to bind this power with limitations. It is submitted that an extension of this power would be highly desirable, and would check the flippant and "loose ideas of testifying" now current in the courts. Witnesses who obviously lie go unpunished and unreprimanded. Persons charged with crime give on oath evidence palpably false and are supported in their assertions by friends and relatives. Making due allowance for the frailties of human memory and observation, juries are asked to consider evidentiary facts of absolute incompatibility. It can very well be asked, how can justice be administered at all under such conditions.

—AUGUST W. PETROPLUS.

---

<sup>35</sup> *U. S. v. Karns*, 27 F. (2d) 453 (D. C. N. D. Okla., 1928).

<sup>36</sup> *Blakenburg v. Mass.*, 172 N. E. 209 (Mass. 1930).

<sup>37</sup> *Idem*.

<sup>38</sup> *U. S. v. Carroll*, 147 Fed. 947 (D. C. D. Mont., 1906); *State v. Kaysor*, 25 N. Mex. 245, 181 Pac. 278 (1919).

<sup>39</sup> *Ricketts v. State*, 111 Tenn. 380, 77 S. W. 1076 (1903); *Beattie v. People*, 33 Ill. App. 651 (1889), (an attorney for a client seeking a divorce fabricated evidence to sustain a ground of adultery).

<sup>40</sup> *Keeney v. U. S.*, 17 F. (2d) 976 (C. C. A. 7th, 1927).

<sup>41</sup> *State v. Moody*, 47 S. D. 111, 196 N. W. 500 (1923).

<sup>42</sup> *Backer v. A. B. and B. Realty Co.*, 107 N. J. Eq. 246, 152 Atl. 241 (1930).